88-1580

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1988

DEL PERCIO, INC., et al.,

Petitioners,

v.

CITY OF DAYTONA BEACH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RICHARD L. WILSON
211 N.E. 33rd Street
Fort Lauderdale, Florida 33334
(305) 564-2942

and

ERIC A. LATINSKY
326 1/2 Beach Street
Daytona Beach, Florida 32014
(904) 257-5555

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Is an adult entertainment zoning ordinance which has the effect of suppressing, or greatly restricting access to, lawful speech, and which virtually eliminates adult entertainment businesses from a city, an unlawful restriction of activities protected by the First Amendment, as held in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981) and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986)?

2. Is an adult entertainment zoning ordinance which requires governmental permission to open and operate an adult business, and which contains language so vague as to allow a government official the power to grant or deny permission in the exercise of unfettered discretion, an unlawful restriction on activities protected by the First Amendment, as held in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1958)?

LIST OF PARTIES

There are three Petitioners in this case, each of them a Florida corporation: DEL PERCIO, INC., PINK PUSSYCAT, INC. and FUNCTION JUNCTION, INC.

There is one Respondent: the CITY OF DAYTONA BEACH, a Florida municipal corporation.

There are no entities to report or list pursuant to this Court's Rule 28.1.

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OPINIONS BELOW

The unreported opinion of the United States District Court for the Middle District of Florida is reprinted in Appendix A. The order of the District Court modifying the Findings of Fact is reprinted in Appendix B. The unreported opinion of the United States Court of Appeals for the Eleventh Circuit is reprinted in Appendix C.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion on December 16, 1988. On March 16, 1989 Mr. Justice Anthony M. Kennedy entered an Order extending the time in which to file a petition for writ of certiorari through March 26, 1989. This petition is filed within that extension period. The opinion of the Court of Appeals, upholding the final judgment of the District Court, constitutes a final judgment in a civil case. This Court has jurisdiction pursuant to 28 U.S.C. sec. 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law . . . abridging the freedom of speech . . . .

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

PROVISIONS OF DAYTONA BEACH CODE

The applicable provisions of the Daytona Beach Municipal Code are included in the opinion of the District Court, as reprinted in Appendix A.

STATEMENT OF THE CASE

There are two reasons why this Court should review this case. The courts below authorized any municipality in the Eleventh Circuit, including one which allows virtually all other forms of entertainment, to effectively eliminate sexually oriented non-obscene entertainment through highly restrictive zoning aimed at adult entertainment. The courts also gave approval to the use of extremely vague language in an ordinance which requires government permission before operating an adult entertainment business, so that a government official may exercise completely unbridled discretion in denying permission for such entertainment. On both points, the courts below are in direct conflict with overwhelming case law, including several decisions of this Court.

The City of Daytona Beach, on Florida's east central coast, occupies approximately 31.5 square miles (about 20,160 acres) and has an approximate population of 59,000. The City has an average mix of residential, commercial and industrial

uses, and entertainment plays a large role in the City's economy.[1]

Petitioners have been operators of three adult nightclubs in the city.[2] Each of their businesses was in continuous operation at its same location prior to the enactment of an extremely restrictive zoning ordinance in September, 1981. The ordinance, which banned adult businesses from more than 99.84% of the City, defined adult nightclubs as "adult theaters," and imposed zoning and distance restrictions on them. A provision in the ordinance allowed any adult business which was in operation at the time of its enactment to continue presenting adult entertainment until January 1, 1992.

In October, 1981 the City enacted a second ordinance, prohibiting nude dancing in places where alcoholic beverages are present. Petitioners challenged that ordinance in numerous court cases, and during a significant period of time were compelled to clothe their entertainers to avoid arrests while court cases were pending. Finally, in August of 1985, the

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1 In addition to hundreds of alcoholic beverage licenses for restaurants and lounges, the City is home to the Daytona International Speedway, site of world-famous stock car races, and a major new convention center, where nationally known entertainment acts present concerts. The City also hosts "Spring Break," traditional vacation time for nearly half a million college students from throughout the nation, and "Bike Week," an annual meeting of motorcycle clubs. Indeed, the City not only welcomes these entertainment extravaganzas, it courts and encourages them.

2 In this Petition, the term "adult nightclub" refers to a commercial establishment presenting nonobscene topless dancing by female performers as entertainment. The City includes such a business in its definition of an adult theater.

ordinance was upheld by the Florida Supreme Court in *City of Daytona Beach v. Del Percio*, 476 So.2d 197 (Fla. 1985). At that time, Petitioners attempted to terminate alcoholic beverage sales in order to resume the presentation of nude entertainment; however, they were prevented from doing so by the City. The City took the position that when the nightclubs clothed their dancers to avoid arrests during the aforementioned court cases, they waived their nonconforming use status and would be in violation of the zoning ordinance if they presented any adult entertainment.

Thus, the zoning ordinance prohibits the Petitioners from presenting adult entertainment at their present locations, in spite of the fact that they were presenting the very same entertainment at those locations for many years prior to the enactment of the ordinance. At time of trial, there were only two or three adult businesses in the entire City of Daytona Beach (all nonconforming uses), and not a single adult nightclub. As a result of the ordinance, there will not be a single adult business in the City as of January 1, 1992.[3]

On February 3, 1986 Petitioners filed a Complaint, under 42 U.S.C. sec 1983, in the United States District Court

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[3] When the ordinance was passed, there were twenty adult businesses in Daytona Beach. By trial that number had been reduced to two or three, which must close by January 1, 1992. Thus, by 1992 the City will have eliminated 100% of its pre-existing adult businesses. In a City which welcomes virtually all other entertainment with open arms (including an annual gathering of thousands of "Hell's Angels" motorcyclists), nonobscene adult entertainment is being totally eliminated.

for the Middle District of Florida. The Complaint sought a judgement declaring that the ordinance was unconstitutional under the First Amendment, and an injunction permanently forbidding its enforcement against Petitioners.

On June 19, 1987 the case was heard before District Court Judge G. Kendall Sharp. There was no quarrel as to the percentage of land available for adult businesses in Daytona Beach. The parties stipulated that the ordinance prohibits any adult business in over 99.84% of the City of Daytona Beach; out of more than 20,000 acres in the City, only 32 acres were left available for such businesses. Applying the distance restrictions in the ordinance, the court found that there is an absolute maximum of eight locations in the entire City.[4]

There was also no dispute at trial as to the vagueness of the ordinance. That was established quite clearly with the testimony of Fred Holmes, Deputy Building Official for Daytona Beach. The following statements of Mr. Holmes demonstrate the amount of discretion a building official has in deciding whether to allow or disallow an adult business at a particular location:

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4 There are only eight locations if the City if very generous in construing its own ordinance. Given a history of vigorous opposition to adult entertainment by the government and police of Daytona Beach, and a strong effort to drive these businesses out of existence, it would be somewhat naive to believe that the City would give adult entertainment businesses the benefit of a favorable construction.

Q. Mr. Holmes, are you familiar with the provisions of this ordinance concerning the distance provisions?

A. Yes.

Q. And are you familiar with the provision which requires you not to be where large numbers of minors travel or congregate?

A. Yes.

Q. Now, as I understand it, you testified that that would not include a convenience store?

A. That would not include a convenience store.

Q. All right. Then your testimony would be that a convenience store which regularly had large numbers of minors congregating there and/or traveling to and from there would not be included within the scope of that definition, is that correct?

A. A convenience store is not a place of assembly.

Q. Is it not a public or semi-public place of assembly?

A. No.

Q. Are you saying that your understanding of this ordinance means only certain types of public places of assembly.

A. Yes.

Q. What types?

A. Anytime you have congregated fifty or more persons.

This definition is not in the ordinance. In fact, Mr. Holmes decided on his own to use the number "fifty" in his personal definition of place of assembly because of a definition he found in a totally different ordinance, the Daytona Beach Life Safety Code! That ordinance, as Holmes testified, sets requirements for emergency exits in buildings. As Holmes further testified, any other building official enforcing the adult entertainment ordinance could use any other number he felt appropriate:

Q. There's nothing in [sec. 51.2.4], however, that says you have to use the Life Safety Code in deciding what a large number is, is there?

A. Nothing that dictates them to use that, no.

Q. And you used it because you felt it was appropriate?

A. Yes.

Q. And the next Mr. Holmes might feel it would not be appropriate, is that correct?

A. We went through that, yes.

Thus, what is meant by "public or semi-public place of assembly where large numbers of minors regularly travel or

congregate" is left to the judgment of a building official. That judgment amounts to unfettered discretion.

More of Holmes' testimony illustrates how discretionary the language is:

> Q. How about restaurants? You talked about fast food restaurants, is that right?
>
> A. [Yes].
>
> Q. You mean like McDonalds and Burger King and places like that?
>
> A. They are restaurants and *they are places of assembly*, yes.
>
> Q. Is that what you called fast food restaurants?
>
> A. Yes.
>
> Q. In fact, did you identify one of the locations here as including a fast food restaurant?
>
> A. [Yes].[5]
>
> Q. What if you had on a regular basis, like every day after school, every weekend after every football game, in excess of fifty minors in and around that fast food restaurant?

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5 Holmes also said there was a Burger King right in the middle of one of the eight locations. However, on the day he determined there were eight locations he arbitrarily decided that the Burger King was not a place where large numbers of minors congregate <u>because it serves food!</u>

A. We would have to take a good hard look at it.

Q. But would it be a place where large numbers of minors regularly travel or congregate?

A. No, I don't think so.

Q. And why not?

A. Because the principal use is the serving of food.

Thus, not only does the building official have the authority to determine how many minors constitute a large number, he can also decide that issue *depending on the use of the building!* This evidence, presented by the City through its own building official -- the person charged with responsibility for enforcing the ordinance -- clearly shows how much unlawful discretion the ordinance contains. Whether a particular site is available for an adult business depends on which building official happens to consider the situation:

Q. I hand you a document that is identified [sic] Article Three, Definition of Words, Ordinance 51.2, Location, 51.2.4, ask you to read that as the specific provision that we're discussing right now.

A. Okay.

Q. Have you read it, sir?

A. Yes, sir.

Q. All right. Can you tell me where it says in there that that would exclude a restaurant because its primary business is serving food?

A. No, it doesn't exclude it.

Q. Can you tell me where it says in there that fifty constitutes a large number of minors?

A. Not in that ordinance, no.

Q. Can vou tell me where in this ordinance it references any other ordinance in the City of Daytona Beach to tell us what large number of minors means?

A. No.

Q. Can you tell me where in this ordinance it references any other ordinance in the City of Daytona Beach which provides this restaurant exception that you're talking about.

A. No.

Q. Can you tell me where in this ordinance it gives you the standards to determine what is meant by the phrase large number of minors?

A. Yes.

Q. Tell me.

A. It's in the preamble to the ordinance, the zoning ordinance, and that gives the chief building official *the right to interpret and enforce the zoning ordinance.*

Q. Interpret and enforce.

A. Yes.

Q. Now, Mr. Holmes, if you became mayor tomorrow and a new building official took your place, this ordinance allows him, does it not, to decide that one hundred and fifty is a large number?

A. I would think that he would have that option with reservations, yes.

Q. . . . And would this new Fred Holmes also have the authority to . . . construe this ordinance to mean twenty-five is a large number, correct?

A. Correct.

Q. And couldn't he also say "[C]ontrary to my predecessor, the learned Fred Holmes, I believe that a fast food restaurant is a place where large numbers of minors travel or congregate," correct?

A. I don't think so.

Q. Well, how would he be prevented, sir, by the terms of this ordinance?

A. A store is not a standard place of assembly. It's a retail outlet.

Q. Large numbers of the public assemble at places which are retail outlets, do they not?

A. The convenience stores are generally not large enough to house that number of people. However, you may be right, the Chief Building

Official could make a determination that would be contrary to my thinking.

Q. In effect, then, Mr. Holmes, aren't you saying that the determination of what constitutes a large number of minors and a determination of where they regularly travel or congregate is pretty much up to whoever is enforcing the Code at that time?

A. I don't know. He still has guidelines to go by.

Q. Does he not have great discretion in applying those guidelines?

A. I think so, yes.

Even the definition of adult theater in the zoning ordinance leaves it up to the individual building official to determine which businesses are included. Holmes was asked if the presentation of nude dancing in and of itself would constitute adult entertainment:

Q. Would it matter to your office if the totally nude entertainment was not harmful to minors?

A. I don't know what harmful to minors would be. I'm not an expert in that field.[6]

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6 Another principal City witness -- Gerald Langston -- agreed that the phrases challenged herein were subjective. And this witness was qualified as an expert in urban planning by the trial court.

Q. In fact, Mr. Holmes, is it not your opinion that any exposure of the female breast is activity which is harmful to minors?

A. No.

Q. Is any exposure of the human female breast in connection with a stage performance adult entertainment?

A. Yes.[7]

On December 17, 1987 the trial court entered judgment for the City and dismissed the case. The court made no finding as to whether the ordinance had the effect of suppressing or greatly restricting access to lawful speech or whether the ordinance effectively denied Petitioners a reasonable opportunity to open and operate an adult nightclub.

On December 16, 1988 the United States Court of Appeals for the Eleventh Circuit entered its opinion affirming the trial court's decision, *per curiam*.

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7 All emphasis in Holmes' testimony has been added by the author.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW, UPHOLDING AN ORDINANCE WHICH VIRTUALLY ELIMINATES SEXUALLY EXPLICIT NON-OBSCENE ENTERTAINMENT FROM THE CITY OF DAYTONA BEACH, IS IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND SEVERAL COURTS OF APPEALS.

In 1976, this Court handed down the first of three important decisions defining the power of local governments to zone adult businesses. In *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), the Court upheld a Detroit ordinance adding adult theaters and bookstores to a list of other regulated uses which were prohibited from concentrating together. 427 U.S. at 53-54. Of significant importance to the Court's decision in the case was the fact that the ordinance did not limit in any significant way the number of available locations for adult businesses in Detroit. Otherwise, as the Court noted, the ordinance might not have been upheld:

> The situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that "[t]he Ordinances do not affect the operation of existing establishments but only the

> location of new ones. There are myriad locations in the City of Detroit which must be over 1000 feet from existing regulated establishments. This burden on First Amendment rights is slight." 373 F.Supp., at 370.
>
> *Id.* at 71, n. 35.

In *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), the Court struck down a zoning ordinance which had prohibited live nude dancing throughout the Borough. Rejecting the Borough's argument that its ordinance was valid under *American Mini Theatres*, the Court said:

> As an initial matter, this case is not controlled by *Young v. American Mini Theatres, Inc.* . . . . Although the Court there stated that a zoning ordinance is not invalid merely because it regulates activity protected under the First Amendment, it emphasized that the challenged restriction on the location of adult movie theaters imposed a minimal burden on protected speech. 427 U.S., at 62. The restriction did not affect the number of adult movie theaters that could operate in the city; it merely dispersed them. The Court did not imply that a municipality could ban all adult theaters -- much less all live entertainment or all nude dancing -- from its commercial districts citywide . . . .
>
> 452 U.S. at 71.

The Court pointed out the importance of the fact that the number of locations for adult theaters in Detroit was not restricted by its ordinance:

> Justice STEVENS relied on the District Court's finding that compliance would only impose a slight burden on First Amendment rights, since there were "myriad locations" within the city where new adult movie theaters could be located in compliance with the ordinances . . . .

Id., n.10.

Several federal appellate courts, relying on *American Mini Theatres*, have invalidated ordinances which imposed a substantial limitation on the number of locations set aside for adult businesses by local zoning schemes. *See, C.L.R. Corp. v. Henline*, 702 F.2d 637 (6th Cir. 1983) (finding zoning ordinance allowing only two to four adult businesses to be unlawfully restrictive of First Amendment rights); *Alexander v. City of Minneapolis*, 698 F. 2d 936 (8th Cir. 1983) (holding that zoning ordinance which closed all pre-existing adult businesses, and provided only twelve locations in the entire city for all adult businesses, was unconstitutional); *Avalon Cinema Corp. v. Thompson*, 667 F.2d 659 (8th Cir. 1981) (striking zoning ordinance which failed to provide adequate locations for adult businesses); *Christy v. City of Ann Arbor*, 824 F.2d 489 (6th Cir. 1987) (vacating a trial court's finding that 0.23% of Ann Arbor was constitutionally sufficient to accomodate adult businesses); *754 Orange Ave., Inc. v. City of West Haven*, 761 F.2d 105 (2d Cir. 1985) (striking down adult zoning ordinance in part because city failed to demonstrate adequate available locations for adult businesses); *Basiardanes v. City of*

Galveston, 682 F.2d 1203 (5th Cir. 1982) (striking zoning ordinance which failed to provide adequate locations for adult theaters); *Keego Harbor Co. v. City of Keego Harbor*, 657 F.2d 94 (6th Cir. 1981) (striking zoning ordinance which effectively banned adult theaters); *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331 (9th Cir. 1987) (vacating judgment which had found 1.35% of Whittier's land area sufficient for adult businesses); *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348 (9th Cir. 1985) (vacating trial court order upholding ordinance requiring nine of ten adult businesses to close, and failing to provide adequate sites for relocation); *Ebel v. City of Corona*, 767 F2d 635 (9th Cir. 1985) (striking adult zoning ordinance which failed to provide adequate locations for adult businesses).

Several district courts have reached the same conclusions. *See, i.e., Amico v. New Castle County*, 571 F.Supp. 160 (D. Del. 1983); *Bayside Enterprises, Inc. v. Carson*, 450 F.Supp. 696 (M.D. Fla. 1978); *North Street Book Shoppe v. Village of Endicott*, 582 F.Supp. 1428 (N.D. N.Y. 1984); *Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207 (N.D. Ga. 1981); and *815 Foxon Road, Inc. v. Town of East Haven*, 605 F.Supp. 1811 (D. Conn. 1985).

In those cases where zoning ordinances have been upheld, there has been an express finding, supported by the evidence, that the ordinances did not significantly restrict available locations. *See, i.e., Lydo Enterprises, Inc. v. City of*

Las Vegas, 745 F.2d 1211 (9th Cir. 1984); *S.D.J., Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988), *cert. denied*, _____ U.S. _ (1989); *F.W./PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988) *cert. granted on other grounds*,__ U.S. _____ (1989).

In this case the District Court has upheld an ordinance which not only severly restricts adult entertainment by placing an absolute limit of eight on the number of such businesses which could *theoretically* open and operate, but will have the practical effect of totally eliminating such businesses from the community by January 1, 1992.

In 1986, this Court revisited the subject of adult business zoning. In *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) the Court upheld a municipal ordinance which set aside approximately 5% of a community's land area for adult theaters. 475 U.S. at _____, 106 S.Ct. at 932. The ordinance had prospective application only. 475 U.S. at ___, 106 S.Ct. at 927. The Court found that the ordinance did not unduly restrict adult entertainment.

Renton, Washington was a community of about 16 square miles, with a population of 32,000 people. At the time it enacted its adult business zoning provision there were no adult businesses operating in the city. In its ordinance, the city had left 520 acres available for adult businesses, a space that

would accomodate 435 adult theaters.[8] In startling contrast, the City of Daytona Beach -- with twice the land area and twice the population, has left enough land for eight adult businesses at a maximum!

In *Renton*, the Court explained how its decision was in harmony with *American Mini Theatres*, including Justice Powell's concurring opinion. The very thrust of those two cases seems to be that an adult business zoning ordinance will be upheld only if: 1) it is aimed at secondary effects of the businesses, not at suppressing speech;[9] and 2) it leaves the availability of sites for adult businesses virtually unrestricted. As the Court said in *American Mini Theatres*, one of the principal reasons it upheld the Detroit ordinance was that it left the market for adult entertainment virtually unrestrained, that there were "myriad" locations in Detroit for new adult businesses. 427 U.S. at 71."Myriad" means "numerous," "multitudinous," "legion," "many." Respondent's counsel at trial defined it as "a great number." One would hardly call "eight" a great number, or numerous, or voluminous. And as the several courts which have applied *American Mini Theatres* since 1976 have concluded, a zoning ordinance which fails to

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8 As pointed out in the Jurisdictional Statement in the Renton case (at page 18, n. 38) the 435 figure was computed by dividing the number of square feet needed to accomodate an adult theater into the number of square feet in 520 acres.

9 This ordinance is non content-neutral. The City has never seen any evidence that a single adult nightclub, presenting nonobscene nude dancing and selling no alcoholic beverages, causes any secondary effects, in Daytona Beach or any other city.

provide adequate locations for adult businesses runs afoul of the First Amendment.

The record in this case demonstrates that the available locations for adult businesses in Daytona Beach are woefully inadequate. There is no reasonable opportunity to open and operate an adult theater in the City. Unless this Court grants review, the decision below will become the law in the Eleventh Circuit, and will place that circuit in direct conflict with overwhelming case law from this Court and several federal trial and appellate courts. The Court should grant review to bring the law in the Eleventh Circuit in line with *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

II

THE DECISION BELOW, UPHOLDING AN ORDINANCE SERIOUSLY RESTRICTING FIRST AMENDMENT ACTIVITIES, WHICH IS REPLETE WITH FACIALLY VAGUE AND OVERBROAD TERMS, IS IN DIRECT CONFLICT WITH DECISIONS OF THIS COURT AND FEDERAL APPELLATE COURTS OVER MORE THAN THIRTY YEARS.

It is long settled that an ordinance which regulates First Amendment activity must be drawn in terms so clear and unambiguous that it leaves no room for subjective interpretation and arbitrary enforcement by government officials. Yet the ordinance before this Court has several provisions which are so totally subjective as to be facially unconstitutional.

The ordinance prohibits the operation of an adult business within 400 feet of any public or semi-public place "where large numbers of minors regularly travel or congregate." There is no definition of any of the terms in this phrase, nor reference to where definitions might be found.

An adult theater is one in which a single instance of nudity occurs which is *harmful to minors*. Fred Holmes, the official charged with enforcing the ordinance doesn't know what "harmful to minors" means, by his own testimony. Yet he stated that the exposure of a single female breast, even one time, would bring a business within the prohibitions of the

ordinance. This Court has ruled that nudity, in and of itself, is not obscene even to minors. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975). *See also, Tollis v. San Bernadino County*, 827 F.2d 1329 (9th Cir. 1987). Nevertheless, Holmes interpreted the ordinance in this case in such a manner as to make even the briefest exposure of a female breast "harmful to minors," whether he knew what that phrase meant or not.

The provision forbidding the location of an adult business near any place "where large numbers of minors travel or congregate" is invalid under the *Erznoznik* decision. In that case this Court struck an ordinance requiring drive-in theaters which showed movies with any nudity to construct high fences around them. As the Court explained, the ordinance could not be justified simply by a desire to protect children, unless it were limited to films showing sexually explicit fare. As in *Erznoznik*, the Daytona Beach ordinance applies to any business which, live or in a film or book, allows the single exposure of a female breast, regardless of circumstances.

One more phrase must be examined in light of Petitioners' unsuccessful claim that the ordinance was vague. The locational restrictions can be waived pursuant to sec. 51.3 of the ordinance if the City finds, *inter alia*, that a waiver would "not be contrary to the public interest and that the spirit and intent of the ordinance will be observed." The trial court even

chastised Petitioners for failing to apply for a waiver under this provision.

First, Petitioners did not have to apply for a waiver before bringing their action. *Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982). And more significantly, the waiver provisions are blatantly unconstitutional under controlling case law.

In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1958) this Court struck an ordinance which required a permit to conduct a parade. The Court, in finding the ordinance facially invalid, said:

> There can be no doubt that the Birmingham ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any "parade," "procession," or "demonstration" on the city's streets or public ways. For in deciding whether or not to withhold a permit, the members of the Commission were to be guided only by their own ideas of "public welfare, peace, safety, health, decency, good order, morals or convenience." This ordinance as it was written, therefore, fell squarely within the ambit of the many decisions of this Court over the last 30 years, holding that a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.
>
> 394 U.S. at 150-51.

See also, Staub v. City of Baxley, 355 U.S. 313 (1958).[10]

The ordinance here is so vague in its terms that the official charged with its interpretation and enforcement has no idea what it means. The definition of "adult theater" is vague; the waiver provisions are vague; the locational restrictions are vague. This ordinance is precisely the type of restriction on First Amendment activities that has been struck by courts for many decades. This Court should grant review, to reaffirm the long-standing principle, deeply rooted in our Constitution and several decades of court decisions, that when a law includes a requirement that one obtain official approval before freedom of speech may be engaged in, that law may not be so vague as to allow any official the power to authorize only that speech of which the government approves.

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10 Indeed, the list of cases is lengthy where facial vagueness, which would allow the granting or denial of permission to engage in constitutionally protected speech on the whim of the government, has been found unconstitutional. A very brief list would include: Cox v. Louisiana, 379 U.S. 536 ((1965); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1981); Largent v. Texas, 318 U.S. 418 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1939); Thomas v. Collins, 323 U.S. 516 (1945); Schneider v. State, 308 U.S. 147 (1939); and Hynes v. Mayor of Oradell, 425 U.S. 610 (1976).

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Respectfully submitted,

RICHARD L. WILSON
ERIC A. LATINSKY

Attorneys for Petitioners